

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

State of New Hampshire

v.

Dwayne Thompson

No. 00-S-1172

ORDER

The defendant is charged with first-degree murder in the death of Robert Provencher. Before the Court is the defendant's Motion in Limine Regarding Allegations of Homosexual Relationships in which the defendant requests that the Court exclude any evidence that he and Mr. Provencher were involved in a homosexual relationship and any evidence that he is a homosexual. The State objects. The Court held a hearing on this matter on February 28, 2002. For the reasons stated below, the defendant's motion is **DENIED** in part and **GRANTED** in part.

The facts relevant to this issue are as follows. On February 24, 2000, the body of Robert Provencher was discovered in his apartment, located at 88 North Main Street. At the time of his death, the defendant lived with Mr. Provencher in this one-bedroom apartment. They had lived together for most of the preceding twenty years. In the weeks before Mr. Provencher's death, the relationship had grown contentious. The sources of this contention were the defendant's recent use of alcohol, the defendant's failure to maintain employment, and the defendant's

financial dependence on Mr. Provencher. In the days before his death, Mr. Provencher told Sharon Fidler, and employee at the Brown Bag Deli, that he was "tired of supporting" the defendant financially and that he planned on confronting the defendant and telling him to get his act together and requesting that he move out of their apartment. He also told Pihsia Li, the owner of the Brown Bag Deli, that he was upset that the defendant could not keep a job and was planning to throw him out of the apartment.

The State has identified eight witnesses who have provided information indicating that the defendant and Mr. Provencher shared a sexual relationship: 1) Paul Brogan; 2) David Arsenault; 3) Peter Sartorelli; 4) Kenneth Marquis; 5) Terry Hodgdon; 6) Eric Calley; 7) Rudolph LaFond; and 8) Dave Whelan. State's Obj. to Def.'s Mot. ¶s 4-5 at 2-3. The defendant objects to the introduction of any and all evidence that he is a homosexual and that he and Mr. Provencher shared a homosexual relationship. The basis for his motion is that such evidence is not relevant, and even if it were, under N.H. Rule of Evidence 403, its probative value is outweighed by the unfairly prejudicial effect.

The Court begins by evaluating whether evidence that the relationship between the defendant and Mr. Provencher had a sexual aspect to it is relevant. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.'" State v.

Walsh, 139 N.H. 435, 436 (1995) (quoting N.H. R. Ev. 401). Evidence that is not relevant is inadmissible. N.H. R. Ev. 402. The Court finds that evidence of the sexual aspect of the relationship between the defendant and Mr. Provencher is probative of the nature of the relationship between the defendant and Mr. Provencher and the level of intimacy between them. One component of the State's theory of motive is that the defendant may have killed Mr. Provencher because Mr. Provencher disapproved of the defendant's recent behavior and requested that he move out of the apartment. The level of intimacy is probative of the precise emotional and financial implications that Mr. Provencher's request had on the defendant, which in turn, is probative of how the defendant reacted when confronted with this information. Moreover, it helps place in context other evidence about the nature of the relationship, such as the fact that Mr. Provencher and the defendant lived together for twenty years and that the defendant had power of attorney over Mr. Provencher's account.

The defendant further argues that evidence of the sexual aspect of the defendant's relationship with Mr. Provencher, if relevant, is more prejudicial than probative because of society's disapproval of homosexual behavior. See N.H. R. Ev. 403. The Court finds that the danger of unfair prejudice is minimal. Other evidence, including that the defendant and Mr. Provencher lived together for twenty years and that they were living in a one-bedroom apartment at the time of the murder, will cause the

jury to speculate or conclude that their relationship was homosexual. Moreover, as the Court will address below, the testimony regarding the sexual aspect of the relationship between the defendant and Mr. Provencher will be limited.

The Court must next determine which of the proffered evidence regarding the sexual aspect of the relationship is admissible. Two witnesses will testify about admissions the defendant made about his sexual relationship with Mr. Provencher. Paul Brogan spoke with Lieutenant Robert Barry on February 26, 2000. Lieutenant Barry's report indicates that the defendant stated to Mr. Brogan that he was "sexually servicing Provencher," that the defendant "repeatedly spoke about the sexual activity that he and Provencher engaged in," and that the defendant "alluded to this type of relationship often in the since years." Kenneth Marquis has informed the State that the defendant told him that he and Mr. Provencher were "together as a couple." These statements constitute admissions and relate exactly to the matter at issue--the sexual aspect of the defendant's relationship with Mr. Provencher. See N.H. R. Ev. 801(D)(2). Assuming that the evidence is as proffered, they are reliable and thus admissible.

The Court next addresses David Arsenault's proffered testimony that the defendant had, at some point in the past, attended meetings for gay men and "liked" to visit "Front Runners" or "1240." There has been no allegation that these facts in any way motivated the murder. Rather, they are being

offered to prove that the defendant was a homosexual because he socially interacted with gay men. This behavior is not probative of the nature of the relationship specifically between the defendant and Mr. Provencher. Thus, it is irrelevant and inadmissible.

The State also hopes to admit the testimony of Eric Calley, Peter Sartorelli, Terry Hodgdon, Rudolph LaFond, and Dave Whelan. These individuals would testify that it was "common knowledge" that the defendant and Mr. Provencher had a sexual relationship, or that it was assumed to be so. Whether others assumed or speculated that the defendant and Mr. Provencher shared a sexual relationship is not reliable or even probative of that fact.

While the Court finds that the defendant's admissions to Mr. Brogan and Mr. Marquis are admissible for the reasons stated above, evidence of the sexual aspect of the relationship is not central to the State's theory of motive in this case. Compare, Grimes v. State, 450 N.E.2d 512, 518-19 (Ind. 1983) (upholding the admissibility of evidence of homosexual relationship between victim and defendant where crime scene indicated homosexual activity and possibility of bondage or sado-masochism); Chumberland v. Com., 905 S.W.2d 488, 494 (Ky. 1995) (upholding admissibility of evidence of homosexual relationship between co-defendants where this extra-marital affair motivated murder of one defendant's wife). Thus, the State is cautioned not to needlessly emphasize the issue. See Jones v. U.S., 625 A.2d 281, 288 (D.C.App. 1993) (holding that trial court abused its

discretion by allowing the government to present "excessive evidence and argument" that defendants were homosexual where it had ruled that such evidence was admissible for the limited purposes of proving their identities and that "there was a unique bond between them").

As a final matter, the defendant argues that if evidence of the sexual aspect of his relationship with Mr. Provencher is admitted, the Court should also admit evidence of Mr. Provencher's prior homosexual relationships and attraction to young males to establish that someone other than the defendant may have murdered Mr. Provencher.¹ Under the facts of this case, the proffered evidence is merely speculative and is not probative of whether there was an alternate perpetrator. See Echols v. State, 936 S.W.2d 509, 532 (Ark. 1996) ("[E]vidence that a third party may have committed the crime is inadmissible unless it points directly to the guilt of the third party. If it creates no more than an inference or conjecture as to the third party's guilt, it is inadmissible."). Moreover, its admission would function only to emphasize issues of sexual orientation, which the defendant seeks to avoid. Accordingly, the Court finds that evidence of Mr. Provencher's prior sexual relationships with men or attraction to them is inadmissible. See N.H. R. Ev. 402.

To summarize, the defendant's motion is **DENIED** as to the

¹ The defendant also seeks to admit this evidence to explain why people may have thought the defendant was having a sexual relationship with Mr. Provencher. Since the Court has ruled that what others thought about the sexual aspect of the relationship is inadmissible, it need not

following: 1) defendant's admissions to Paul Brogan regarding the nature of his relationship with Mr. Provencher; 2) defendant's admissions to Kenneth Marquis as to the nature of his relationship with Mr. Provencher; and 3) evidence of Mr. Provencher's prior sexual relationships and attraction to young men. The defendant's motion is **GRANTED** as to the following: 1) evidence that the defendant patronized the "Front Runner" or "1240"; 2) evidence that the defendant attended meetings for "gay men"; and 3) testimony that people assumed or believed that Mr. Provencher and the defendant's relationship had a sexual aspect or that it was "common knowledge."

So Ordered.

Dated: March 4, 2002

KATHLEEN A. MCGUIRE,
Presiding Justice

address this argument.